FILED
AUG 28 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 408

CLOVER SPLINT COAL CO., INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.....

CLOVER SPLINT COAL CO., INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States;

Your petitioner, Clover Splint Coal Co., Inc., a corporation, respectfully prays that a writ of certiorari issue to review the final order and decision of the United States Circuit Court of Appeals for the Third Circuit, entered on the 6th day of June, 1944, affirming an order of The Tax Court of the United States, finding that there were deficiencies against this petitioner in income taxes in the respective principal amounts of $6,528.51 and $6,064.60 for the calendar years 1938 and 1939, re-

spectively. An order has been entered staying the mandate pending this application.

OPINIONS BELOW
(Record)

There is presented with this petition a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. Included in such transcript is the printed record, consisting of appendix to the brief of petitioner filed in the Circuit Court of Appeals, and references to the record herein set forth are to the pages of such printed record. There is filed with this petition stipulation of counsel for petitioner and respondent that subject to the approval of the Court such appendix and proceedings in the Circuit Court of Appeals may constitute the printed record upon this petition. The memorandum, findings of fact, and opinion of The Tax Court of the United States appear at pages 62-a to 64-a, inclusive of the printed record, and the opinion of the Circuit Court of Appeals not yet officially reported appears in the transcript of the record.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Chap. 229, 43 Stat. 936, 28 U.S.C.A. 347).

STATUTE INVOLVED

The issues involve the construction and application to the facts of this case of Section 114(b)-4 of the Act of Congress approved June 22, 1936, known as the Revenue Act of 1936, which reads as follows, those portions

thereof especially pertinent to the determination of this matter being italicized by us:

"(4) PERCENTAGE DEPLETION FOR COAL AND METAL MINES AND SULPHUR.— The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. *The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section. The above right of election shall be subject to the qualification that this paragraph shall, for the*

purpose of determining whether the method of computing the depletion allowance follows the property, be considered a continuation of section 114 (b) (4) of the Revenue Act of 1934, and as giving no new election in cases where such section would, if applied, give no new election."

STATEMENT OF THE CASE

There is here involved no dispute of fact, and the facts will be found summarized in the opinion of the Court of Appeals and in that of The Tax Court, page 62-a of the printed record.

Clover Splint Coal Company is a West Virginia corporation, keeping its books and filing its tax returns for the calendar years 1938 and 1939 in the office of the Collector of Internal Revenue at Pittsburgh, Pennsylvania. For some years prior to 1934, it operated a coal mining lease in Kentucky. In each of the years 1934 and 1935 it had substantial net losses (see Exhibit Tax Returns), and on its returns for those years it made no election with respect of percentage depletion. In the year 1936 it had a small net income and first elected percentage depletion in its first return for that year. In 1938 and 1939 it made claims for deduction of depletion on the percentage basis, which were disallowed by the Commissioner of Internal Revenue, respondent in this case, resulting in the deficiencies as heretofore set forth in income and excess profits taxes for the years in question. No part of the above amounts claimed for depletion were allowed upon a cost basis. (Printed Record page 52-a). Taxpayer at all times operated under a lease (Exhibit 1-A, printed record, page 53-a), and it has at all times remained the lessee thereunder (Printed Record, page 51-a).

QUESTIONS PRESENTED AND ERRORS URGED

(1) Whether petitioner was entitled to a depletion allowance in the years in question by reason of having elected percentage depletion upon its first return for the year 1936, the latter being the first year in which it had net income from which depletion allowance could be deducted.

(2) Whether the Act of 1936 gave a new election except in cases of change in ownership, it being taxpayer's contention that, by the terms of the latter part of Section 114(b)-4, said act was an extension of prior acts *only for the purpose of following the property in the case of transfer*. The refusal of the Court below to hold that the Act of 1936 gave taxpayer a new election, there being no transfer of taxpayer's property, is urged as error.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The Circuit Court of Appeals has decided an important question of Federal Law, which is not, and should be, settled by this Court in that,

(a) The interpretation of Section 114(b)-4 of the Revenue Act of 1936, and similar language in other Revenue Acts has been before this Court with respect of the first part of said section, particularly as to the meaning of "first return", but the later language of said section with respect of its being a continuation of prior acts for the purpose of following the property, has not been interpreted by this Court and is a matter of great interest involving operation of a general tax law in situations often likely to arise; and

(b) The interpretation so given by the Cir-

cuit Court of Appeals to the latter part of said section in the present case is inconsistent with the rules of interpretation applicable to this section, laid down by this Court.

(2) The decision of the Circuit Court of Appeals is substantially in conflict with the decisions of this Court on a matter of great public interest, in the following particulars:

(a) At the time of the filing of the petition in The Tax Court of the United States, the Circuit Court of Appeals of the Third Circuit had given a so-called liberal interpretation to Section 114(b)-4 in two cases to be hereinafter discussed, holding (1) that an election of percentage depletion was not necessary until taxpayer had net income from which the deduction might be made of depletion allowance and that the expression "first return" used in the statute was to be construed, not with its literal meaning, but to effectuate an assumed intent of Congress; and (2) that while the literal meaning of the latter part of the statute would limit its operation to cases where there had been a transfer of property, such literal meaning would be disregarded as being against the assumed intention of Congress, and the Act held a continuation of prior acts for all purposes.

This Court, in cases discussed in the brief accompanying this petition, has held that a strict interpretation must be applied to the words "first return" and an election made in the "first" year regardless of whether there was net income, a strict construction that logically must be applied throughout the section in question. Never-

theless, the Circuit Court of Appeals in the instant case adhered to its rule of liberal construction of the latter part of the section, and accordingly, there is an inconsistency whereby (a) under the rule of strict construction, the first contention of taxpayer is denied; and (b) under the liberal construction of the same section of the statute, taxpayer's second contention is denied. There is, accordingly, involved a question of inconsistency in the interpretation of an important Federal Statute applicable in numerous cases.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of case numbered on its Docket No. 8125, and entitled Clover Splint Coal Company, Inc., Petitioner, Appellant, v. Commissioner of Internal Revenue, Appellee, and that the judgment of the Circuit Court of Appeals for the Third Circuit entered on June 6, 1944, may be reversed, and the decision of The Tax Court of the United States entered on June 30, 1943, may be reversed, and this petitioner held not liable for the taxes in question, and that this petitioner may have such other and further relief in the premises as to the Court may seem proper.

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